IN THE 06 1 - 2007

Supreme Court of the United States

Case: #

DONNA MILLER,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for Writ of Certiorari
UNITED STATES COURT of APPEALS for the FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DONNA L. MILLER, PRO SE
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QUESTIONS PRESENTED

Whether the Agency (Department of Agriculture, USDA-NRCS) and the U. S. Merit Systems Protection Board applied the correct law to Petitioners claims of termination due to TCA 8-50-601-604 contacting representatives and reprisal for prior EEO, Section 503 of the ADA 42 U.S.C., 12203 (employer took retaliatory action against employee) activity while serving a probationary period. Question if correct laws applied to discrimination based on disability of Aortic Valve Replacement, on The Rehabilitation Act of 1973, 29 U.S.C. 791 et seq.

PARTIES TO THE PROCEEDINGS

Petitioner is Donna L. Miller, Pro Se. Respondents are USDA-NRCS, Merit Systems Protection Board, Terrence Hall-Dept. of Agriculture, Sean McNamara-Trial Attorney- Dept. of Justice, David M. Cohen- Director-Dept. of Justice, Kathryn Bleecker-Dept. of Justice, United States Courts of Appeals for the Federal Circuit, EEOC-David R. Treeter,-Administrative Law Judge (Indianapolis District Office) and Mr. Andrew Johnson-Office of Civil Rights.

In the Supreme Court of the United States

No. 06-3185

DONNA LEE MILLER, PETITIONER

V.

DEPARTMENT OF AGRICULTURE, USDA-NCRS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

The Acting Pro Se, Donna Lee Miller, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The court of appeals conclusion the Board properly dismissed Donna L. Miller's appeal for lack of jurisdiction and the court affirmed the judgment of the Board.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2006. The jurisdiction of the Court is invoked under 28 U.S.C. 1295(a) (9).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The agency has internal policies regarding employment. Refer to Handbook 31-PM, Reasonable Accommodation. Copies are available from the FFAS DEPM (see contact below), or from The Management Services Division (MSD). **Sick Leave for Family Care (SLFC)** Employees may use their own earned sick leave to care for a family member with a serious health condition or to

accompany a family member to medical appointments. (17-PM, part 10, section 3) The "No Fear Act" Signed by President Bush in 2002. Employment at Will means that an employer can fire an employee for good or a bad reason; it cannot be based on discrimination or retaliation, such as being fired for reporting illegal activities or unsafe conditions. Presence of law or administrative rules restricts an employer's ability to fire at will. Government employees are protected by the 5th and 14th Amendments, which prohibit the government from depriving any person of "life, liberty or property" without the due process of law. Employment at will states recognize certain statutory exceptions to the Doctrine, many recognize common-law exceptions. These types of exceptions render the Doctrine inapplicable when discharging employees. When employers ignore state-recognized exceptions in discharging employees, courts will likely rule that the employer did not have good cause under the Doctrine. This kind of discharges is illegal and collectively referred to as wrongful termination. . Probation periods do not suspend or diminish employee rights and protections under federal and state employment laws against discrimination and harassment. Probationary employees are entitled to the same protections as regular employees. Employers cannot prevent an employee from taking time off work to care for a family member or if they have a serious health condition. Employers under ADA are required to provide leave as it normally does to employees who need to care for someone that is ill. Under Title VII, employers must not discriminate when they provide family or medical leave.

STATEMENT OF THE CASE

This case has completed a final decision from the Administrative Law Judge-EEOC, and final decision of the Merit Systems Protection Board as of December 6, 2006 through the Federal Appeals Court. The Petitioner is asking the Supreme Court to review all documents leading to filing this Writ of Certiorari. Petitioner will provide the information if the Supreme Court cannot get it from the other courts. Donna Lee Miller initially filed an EEOC Informal Complaint of Discrimination dated October 30, 2002. Judge David R. Treeter, EEOC Administrative Law Judge heard this case and made a final decision in which Ms. Miller appealed to the Merit Systems Protection Board. There is an error while Judge Treeter was handling case Ms. Miller received papers from Administrative Judge Weis. Ms. Miller called about this error asking what was going on. Ms. Miller

was told to just overlook this there was a mistake in duplicate request and this would be taken care of. The Merit System Protection Board has made a decision to uphold Judge Treeters final decision. Petitioner feels the correct laws were not applied to her case. Petitioner feels she has adequately made her case. Petitioner feels she has met the elements of a Prima Facie Case of Retaliation as well as discrimination based on fact prior EEOC activity before she was terminated. Tennessee Human Rights Act, Austin v. Shelby County Government, 3 S.W. 3d 474, 480 (Tenn. App. 1999); see also Mountjoy v. City of Chattanooga, 2002 Tenn. App. LEXIS 277 (E.S., decided April 23, 2002). Discrimination included: firing, denying work schedule time change, disciplining through numerous oral and write ups, failure to rehire, intimidation, defamation, not allowing same time off for my child(ren) as any other employee with note from doctor/emergency room for health issues beyond Petitioners control.

REASONS FOR GRANTING PETITION

The case has taken lot of time and energy from Petitioners life. Petitioner feels case harmed her marriage further (divorced now), time away from children working on case. Petitioner feels it is her right as a human being as any other, under the civil laws and rules that protect us. Petitioner strongly feels the statement "that if you let it happen to one you let it happen to all" applies. Petitioner feels the laws and rules were not applied correctly to her case. Petitioner has not been able to see counsel willing to present and fight this case for one reason or another. Attorneys contacted, some said they didn't know employment law enough to fight, or fear of being sued for losing the case, or/and afraid to fight the state and as well federal government. Petitioner has fought for all she has read in the laws for her rights as a human being as all others-fighting alone for what she believes in per all the rules. In reference to (1) retaliation made unlawful by statute, such as Title VII and other federal anti-discrimination laws, or by the Tennessee Human Rights Act; and (2) retaliation made unlawful by common law, such as a termination of employment in violation of some public policy, or under Tennessee's "whistleblower" statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Donna L. Miller, Pro Se
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615-644-5741

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 06-3185

DONNA MILLER,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

Decided: December 6, 2006

Appeals from the United States Court of Appeals for the Federal Circuit
GAJARSA, Circuit Judge, PLAGER, Senior Circuit Judge, and MOORE, Circuit Judge.

PER CURIAM.

The petitioner, Donna Miller, seeks review of a final decision of the Merit Systems Protection Board ("Board") that dismissed, for lack of jurisdiction, her petition for appeal regarding termination from her career-conditional appointment with the Natural Resources Conservation Service. Miller v. Dep't of Agric., No. AT-0353-06-0028-I-1 (M.S.P.B. Nov. 28, 2005) ("Initial Decision"). The Initial Decision became final when the Board declined to review it. Miller v. Dep't of Agric., No. AT-0353-06-0028-I-1 (M.S.P.B. Feb. 24, 2006) ("Final Order"). We have considered Ms. Miller's claims and find them without merit. We therefore affirm the dismissal by the Board for lack of jurisdiction.

DISCUSSION

Whether the Board has jurisdiction to hear a claim is a question of law that this court reviews de novo. Vesser v. Office of Personal Mgmt., 29 F.3d 600, 602 (Fed. Cir. 1994). The petitioner must prove jurisdiction by a preponderance of the evidence. Garcia v. Dep't of Homeland Sec., 437 F.3d 1322, 1338 (Fed. Cir. 2006) (en banc). We have stated that: "The jurisdiction of the Board is limited to those matters specifically delineated by Congress or granted to it by way of regulatory authority exercised by the OPM." Saunders v. Merit Sys. Prot. Bd., 757 F.2d 1288, 1290 (Fed. Cir. 1985).

On appeal to this court, Ms. Miller contends the Board failed to properly apply the Rehabilitation Act, failed to consider her retaliation claim, did not apply Tennessee statutes correctly, and did not acknowledge witness testimony. None of these allegations establish jurisdiction.

The Board has jurisdiction of only those actions made appealable by statute or regulation. 5 U.S.C. § § 7512, 7513, 7701(a) (2006). Removal or termination of employment "is an appealable action where the individual qualifies as an "employee" at the time of her removal by the agency." McCormick v. Dep't of the Air Force, 307 F.3d 1339, 1341 (Fed. Cir. 2002). The term "employee" is defined by 5 U.S.C. § 7511 (a), which provides:

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

5 U.S.C. § 7511 (a) emphasis added). Ms. Miller's career-conditional appointment was subject to completion of a one year probationary period. She did not complete the one year probationary period. Therefore, she does not qualify as an "employee" and is excluded from the statutory appeals process under 5 U.S.C. §§ 7511-14. Stokes v. Fed. Aviation Admin., 761 F.2d 682, 684 (Fed. Cir. 1985).

We have stated, however, that under 5 C.F.R. § 315.806(b), the Board will "consider appeals from agency actions adverse to probationary employees when those employees allege that those actions were the result of partisan political or marital status discrimination." Id at 684-85. Since Ms. Miller has not alleged that the Agency's action was based on either partisan political or marital status reasons, the Board properly dismissed her case for lack of jurisdiction.

Additionally, Ms. Miller's retaliation and Rehabilitation Act claims do not confer Board jurisdiction absent an allegation of marital status or partisan political discrimination. See E.G., Cruz v. Dep't of the Navy, 934 F.2d 1240, 1244 (Fed. Cir. 1991) (en banc) (holding discrimination allegations do not confer Board jurisdiction absent an action that is otherwise appealable to the Board); Lizewski v. Dep't of the Army, 15 M.S.P.R. 417, 419 (1983) (holding the Board lacked jurisdiction to decide whether probationer's termination constituted physical handicap discrimination because there was no alleged marital status or partisan political discrimination). Also, Ms. Miller has not pointed to any statute or regulation that establishes Board jurisdiction to decide claims based on Tennessee state law.

Finally, the Board must provide notice to the appellant of her burden to demonstrate jurisdiction. Burgess v. Merit Sys. Prot. Bd., 758 F.2d 641, 643-44 (Fed. Cir. 1985). The Board has held that failure to inform an appellant of her jurisdictional burden is "magnified" if she is pro se. Yost v. Dep't of Health & Human Serv., 85 M.S.P.R. 273, 277 (2000). Thus, to fulfill the notice requirement, a pro se probationary employee must be

notified that 1) she must make a non-frivolous allegation of partisan political or martial status discrimination, and that 2) she has the burden of providing factual evidence to support her entitlement to a hearing. See Burgess, 758 F.2d at 643-44 (holding that appellant must be notified of what is required to establish an appealable jurisdictional issue and that appellant must produce factual evidence to support her entitlement to a hearing); Johns v. Dep't of Veteran's Affairs, 83 M.S.P.R. 345, 348-49 (1999).

In this case, the Agency's motion to dismiss and attached removal notice gave sufficient notice to Ms. Miller of the first requirement – that she must allege partisan political or martial status discrimination. See Johns, 83 M.S.P.R. at 348 ("An AJ's failure to properly inform an appellant of the Board's jurisdictional requirements may not be prejudicial where the appellant is put on notice by the Agency's motion to dismiss of what he has to allege to establish jurisdiction."). The motion to dismiss, however, failed to give notice of the second requirement – her burden to come forward with evidence. This failure was harmless because Ms. Miller could not have made a claim that invoked the Board's jurisdiction. As discussed above, Ms. Miller did not present a claim that invokes the Board jurisdiction. Moreover, there is no basis in the record that Ms. Miller could establish a partisan political or martial status discrimination claim.

CONCLUSION

For the foregoing reasons, the Board properly dismissed Ms. Miller's appeal for lack of jurisdiction. We affirm the judgment of the Board.

No costs.

APPENDIX B

UNITED STATES OF AMERICA MERIT SYSTEMS
PROTECTION BOARD

No. AT-0353-06-0028-I-1

DONNA MILLER,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Agency

Petition for review in this case asking to reconsider the initial decision.

BEFORE: Neil a. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

Donna Miller, Westmoreland, Tennessee, pro se.

Terrence C. Hall, Washington, D.C., for the agency.

Decided: February 24, 2006

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

APPENDIX C

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations

Appeal No. 0120060306

Hearing No. 250a40018x

Agency No. 0303144

DONNA MILLER,

Complainant,

v.

Mike Johanns, Secretary,

Department of Agriculture, Agency.

Complainant contacted EEOC Counselor and filed on: October 9, 2002.
Complainant filed an appeal on: September 28, 2005
AJ held hearing: December 2-3, 2004
AJ decision: August 23, 2005

Dated: March 16, 2007

DECISION

On September 28, 2005, complainant filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000 *et seq.* and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.* The appeal is deemed timely and is accepted pursuant to 29 C.F.R. § 1614.405(a). There is no evidence that the agency issued a final order after the AJ's decision. Accordingly, the AJ's decision became the agency's final order. *See* 29 C.F.R. § 1614.109(i). For the following reasons, the Commission AFFIRMS the agency's final order.

ISSUES PRESENTED

Whether the AJ's decision finding no disability discrimination or retaliation was supported by substantial evidence.

CONTENTONS ON APPEAL

On appeal, complainant argues that she produced sufficient evident to rebut the agency's reasons for actions, and argued that the agency retaliated against her when she complained about the treatment she received regarding her absenteeism.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the agency's final decision.